A

AZIZ MAT SHAH

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
AZHAR MA'AH JCA
SYED AHMAD HELMY JCA
[CRIMINAL APPEAL NO: W-05-26-2004]

C

10 FEBRUARY 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Appeal against conviction and sentence - Whether High Court judge entitled to rely on s. 300(c) Penal Code in convicting appellant - Whether there was intention*

D

to cause injury - Whether injury sufficient in the ordinary course of nature to cause death - Whether findings of High Court judge could be reversed - Whether conviction and sentence affirmed

E

The appellant was charged with murder under s. 302 of the Penal Code, and, after a trial, was found guilty and convicted and sentenced to death by the learned judge of the High Court. Dissatisfied with the decision of the High Court, the appellant now appealed to this court against the conviction and sentence. The evidence adduced by the prosecution from the relevant prosecution witnesses were that on 1 May 2001, in a hotel room of Drop Inn Lodge City Centre, PW5, the younger brother of the appellant, had witnessed the appellant beating the deceased, who was a child of about three years of age. PW5 further testified that the appellant had punched the deceased's chest and stomach several times in a forceful manner. According to SP5, the deceased was shivering restlessly, had asked for water and thereafter was motionless. PW6, who was also the younger brother of the appellant, was in the same hotel room and corroborated the version of PW5 as to what had transpired that night. On 2 May 2001, the medical officer at Hospital Kuala Lumpur, PW3, had attended to the deceased when she was brought in and testified that the deceased was clinically dead at the time he received her as she was not breathing and not showing any vital signs such as having blood pressure and pulse. Subsequently, the deceased was declared dead. The forensic pathologist, PW7, performed the post mortem on the deceased and listed the cause of death as 'injuries in the abdomen as a result of blunt trauma.' According to PW7, the injuries to the deceased's liver were most probably caused by a heavy blow to the abdomen.

F

G

H

I

At the close of the prosecution's case, the judge of the High Court conducted a maximum evaluation of the evidence adduced by the prosecution, and found that a *prima facie* case was established and directed the appellant to enter his defence. The appellant did not deny that he had hit the deceased but according to him, what he did was to stop the deceased from crying and not to kill her. The appellant conceded that the deceased had died and that her death was caused by the blows which he inflicted on the deceased. At the end of the case for the defence, the High Court judge found that the prosecution had established its case beyond reasonable doubt and held that the appellant was guilty under s. 300(c) of the Penal Code and accordingly convicted the appellant and sentenced him to death under s. 302 of the Penal Code.

Held (dismissing appellant's appeal)
Per Abdul Malik Ishak JCA (delivering the judgment of the court):

(1) The learned High Court judge was entitled to rely on limb (c) to s. 300 of the Penal Code in convicting the appellant because the limb was suitable to be invoked based on the evidence adduced before her. In proving an offence under limb (c) of s. 300 of the Penal Code, the crucial questions to ask would be whether there was an intention to cause injury and whether that injury was sufficient in the ordinary course of nature to cause death. Both PW5 and PW6 had testified that the appellant had inflicted bodily injuries on the deceased. The forceful blows on the deceased's abdomen contributed to the cause of death of the deceased. The cautioned statement of the appellant in exh. D11 gave credence to the prosecution's case in that it showed that the appellant intended to inflict those blows on the deceased. PW7 testified that the injuries sustained were sufficient in the ordinary course of nature to cause death. The finding of facts by the High Court judge could not be reversed. The appeal centred for the most part on factual issues. This court declined to interfere. In the absence of palpable or overriding error which affected the High Court judge's assessment of the facts, this court upheld her findings. (paras 31, 48, 53 & 54)

(2) The High Court judge had taken into account and considered all the evidence adduced in support of the defence. In the face of the overwhelming evidence, the appellant had urged this court to consider amending the offence from s. 300 of the Penal Code to s. 304 of the Penal Code. This court declined

A to interfere with the decision of the High Court. Any reasonable tribunal hearing this appeal would conclude that it was the appellant who was responsible for the death of the deceased. The conviction and sentence were hereby affirmed. (paras 55 & 58)

B

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh atas tuduhan membunuh di bawah s. 302 Kanun Keseksaan dan, selepas perbicaraan, didapati bersalah dan disabitkan dan dihukum mati oleh hakim Mahkamah Tinggi. Tidak C puas hati dengan keputusan Mahkamah Tinggi, perayu merayu di mahkamah ini terhadap sabitan dan hukuman yang diberi. Keterangan yang dikemukakan oleh pihak pendakwaan dari saksi-saksi relevan pihak pendakwaan adalah pada tarikh 1 Mei 2001, di dalam sebuah bilik hotel di Drop Inn Lodge City Centre, PW5, adik D kepada perayu, telah menyaksikan perayu memukul simati, seorang kanak-kanak yang berumur tiga tahun. PW5 seterusnya memberi keterangan bahawa perayu telah menumbuk bahagian dada dan perut simati beberapa kali dengan sekuat-kuatnya. Menurut PW5, simati telah menggigil, dan meminta minuman air dan selepas it terus E tidak bergerak. PW6, yang juga adik kepada perayu, berada di dalam bilik hotel yang sama dan menyokong versi PW5 mengenai apa yang berlaku malam itu. Apabila simati di bawa ke Hospital Kuala Lumpur pada 2 Mei 2001, pegawai perubatan, PW3, telah merawat simati dan memberi keterangan bahawa simati sudah mati apabila F beliau menerimanya kerana simati sudah berhenti bernafas dan tidak menunjukkan tanda-tanda vital seperti mempunyai tekanan darah dan denyutan nadi. Akibat itu, simati disahkan meninggal dunia. Ahli patologi forensik, PW7, menjalankan bedah siasat ke atas jasad simati dan menyatakan sebab kematian sebagai 'kecederaan pada G bahagian abdomen akibat blunt trauma.' Menurut PW7, kecederaan-kecederaan ke atas bahagian hati simati disebabkan pukulan kuat ke atas bahagian abdomen. Pada penutupan kes pendakwaan, hakim Mahkamah Tinggi telah menjalankan penilaian maksimum H keterangan yang dikemukakan oleh pihak pendakwaan dan mendapati satu kes *prima facie* telah dibuktikan dan mengarahkan perayu memasuki pembelaannya. Perayu tidak menafikan bahawa perayu telah memukul simati tetapi menurutnya beliau hanya ingin menghentikan tangisan simati dan bukan membunuhnya. Perayu I akur bahawa simati telah mati dan kematiannya adalah akibat pukulan-pukulan ke atas simati oleh perayu. Di akhir kes pembelaan, hakim Mahkamah Tinggi mendapati bahawa pihak

pendakwaan telah membuktikan kesnya melampaui keraguan munasabah dan memutuskan bahawa perayu bersalah di bawah s. 300(c) Kanun Keseksaan dan mensabitkan perayu dan menjatuhkan hukuman mati di bawah s. 302 Kanun Keseksaan.

Diputuskan (menolak rayuan perayu)
Oleh Abdul Malik Ishak HMR (menyampaikan penghakiman mahkamah):

(1) Hakim Mahkamah Tinggi berhak untuk bergantung kepada cabang (c) s. 300 Kanun Keseksaan dalam mensabitkan perayu sebab cabang itu adalah sesuai untuk digunakan berdasarkan keterangan yang dikemukakan. Dalam membuktikan kesalahan di bawah cabang (c) s. 300 Kanun Keseksaan, soalan-soalan penting yang perlu ditanya adalah sama ada wujudnya niat untuk menyebabkan kecederaan dan sama ada kecederaan tersebut di dalam keadaan biasa cukup untuk mengakibatkan kematian. Kedua-dua PW5 dan PW6 telah memberi keterangan bahawa perayu telah menyebabkan kecederaan badan ke atas simati. Pukulan-pukulan kuat ke atas bahagian abdomen simati adalah salah satu sebab yang menyebabkan kematian simati. Pernyataan beramaran perayu di dalam eks. D11 menyokong kes pendakwaan dalam menunjukkan bahawa perayu berniat untuk memukul simati. PW7 memberi keterangan bahawa kecederaan-kecederaan yang dialami adalah di dalam keadaan biasa cukup untuk menyebabkan kematian. Penemuan fakta-fakta oleh Hakim Mahkamah Tinggi tidak boleh diakas. Rayuan adalah mengenai isu-isu faktual. Mahkamah ini enggan campurtangan. Tiada kewujudan kekhilafan-kekhilafan yang nyata dan penting yang menjejaskan penilaian fakta-fakta Hakim Mahkamah Tinggi, dengan itu mahkamah ini mempertahankan keputusannya.

(2) Mahkamah Tinggi telah mengambil dalam pertimbangan segala keterangan yang dikemukakan untuk menyokong pembelaan. Dalam menghadapi keterangan yang kukuh, perayu telah meminta mahkamah ini mempertimbangkan pindaan kesalahan dari s. 300 Kanun Keseksaan kepada s. 304 Kanun Keseksaan. Mahkamah ini enggan mengganggu keputusan Mahkamah Tinggi. Mana-mana tribunal munasabah yang mendengar rayuan ini akan membuat kesimpulan bahawa perayu bertanggungjawab menyebabkan kematian simati. Oleh itu, sabitan dan hukuman disahkan.

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Anda and others v. The State of Rajasthan AIR 1966 SC 148 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Bear Island Foundation et al v. Attorney-General for Ontario; Attorney-General of Canada et al, Interveners 83 DLR (4th) 381 ***(refd)***
Chow Kok Keong v. PP [1998] 2 CLJ 469 FC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohamed Mokhtar v. PP [1971] 1 LNS 84 HC ***(refd)***
Mohammad Hussain Alimuddin and Others v. Emperor AIR (32) 1945 Nagpur 116 ***(refd)***
Ong Ah Too v. Regina [1955] 1 LNS 80 HC ***(refd)***
PP v. Sa'ari Jusoh [2007] 2 CLJ 197 FC ***(refd)***
PP v. Visuvanathan [1977] 1 LNS 103 HC ***(refd)***
Rajwant Singh, Kalarimadathil Unni v. State of Kerala AIR 1966 SC 1874 ***(refd)***
Tan Boon Teck v. PP [1949] 1 LNS 89 HC ***(refd)***
Tan Cheow Bock v. PP [1991] 1 LNS 37 CA ***(refd)***
The People (Director of Public Prosecutions) v. C [2001] 3 IR 345 ***(refd)***
Virsa Singh v. State of Punjab AIR 1958 SC 465 ***(refd)***
Zahari Yeop Basri & Anor v. PP [1977] 1 LNS 162 HC ***(refd)***

Legislation referred to:

Penal Code, ss. 300(c), (d), 302, 304

Penal Code [Ind], s. 300(c)
Penal Code [Sing] s. 300(c)

Other source(s) referred to:

Ratanlal & Dhirajlal's *Law of Crimes*, 24th edn, vol 2, Bharat Law House, New Delhi 1998, pp. 1285 to 1287

For the appellant - Mohamed Haniff Khatri Abdulla; M/s Haniff Khatri
For the respondent - Kwan Li Sa DPP

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-48-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The appellant was charged with murder under s. 302 of the Penal Code and, after a trial, he was found guilty and convicted and sentenced to death by the learned judge of the High Court. The charge against the appellant was worded as follows:

> Bahawa kamu di antara 1 Mei 2001 jam lebih kurang 10.00 malam sehingga 2 Mei 2001 jam lebih kurang 12.20 malam, di bilik no: 2028, Drop Inn Lodge City Centre, No: 1 & 3, Jalan Tun H.S.Lee, di dalam daerah Dang Wangi, Kuala Lumpur, di dalam Wilayah Persekutuan telah melakukan pembunuhan dengan niat menyebabkan kematian seorang kanak-kanak nama Nik Zarina binti Abdullah, no: sijil kelahiran AG 90212, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] Alias bin Mat Shah (PW5) and Adika bin Mat Shah (PW6) were the prime witnesses for the prosecution. They were the younger brothers of the appellant and they witnessed the entire episode.

[3] Dissatisfied with the decision of the High Court, the appellant now appeals to this court against the conviction and sentence.

The Case For The Prosecution

[4] The evidence adduced by the prosecution from the relevant prosecution witnesses may conveniently be summarised in this way.

[5] The appellant came to Kuala Lumpur together with Zaleha bt Zakaria (PW2), Nik Zarina binti Abdullah (deceased) and the appellant's two younger brothers (PW5 and PW6) from Terengganu. The deceased was the daughter of PW2. At Kuala Lumpur, they all lived in a hotel near Puduraya bus station before they moved to room 2028 of Drop Inn Lodge City Centre.

[6] At the material time, the deceased was only a child of about three years of age. While the appellant, a young male adult of 22 years of age.

[7] On 1 May 2001, PW2 went out to work that night as a prostitute at Chow Kit. PW2 could not recall the exact time when she left for work that night. She left the deceased with the appellant together with PW5 and PW6 in the hotel room. PW2 testified that when she left the hotel room, the deceased was asleep and was alright.

[8] PW5 was asleep in the hotel room. He heard the deceased crying. He then woke up and saw the appellant beating the deceased. PW5 testified that the appellant had first slapped the deceased face several times, then he saw the appellant grabbed the deceased's left shoulder and punched her with his right hand. PW5 further testified that when the deceased was on the bed, the appellant punched the deceased's chest and stomach several times in a forceful manner. PW5 also saw the appellant covered the deceased's face with a pillow on the bed until the deceased stopped crying. According to PW5, the deceased was shivering restlessly "mengelupur" and she was last seen when she asked for water from the bed and thereafter she was motionless. PW5 also confirmed that three days prior to the fateful day, the appellant used to hit the deceased when the deceased was crying (see p. 28 of the appeal record).

[9] PW6 who was also in the hotel room together with the appellant and PW5 corroborated the version of PW5 as to what had transpired in the hotel room that fateful night. According to PW6 while he was watching television in the hotel room, he saw the appellant slapped the deceased several times on her face when the deceased complained that she was hungry and that she wanted the company of her mother. The appellant then went out of the hotel room and he came back with some food about half an hour later. The appellant tried to feed the deceased but she refused. The appellant then punched the deceased. The appellant started slapping the deceased's face and punched the deceased's stomach and chest. The appellant also used a pillow to cover the deceased's face. The appellant slapped the deceased many times forcefully. The appellant also grabbed the deceased's hair with his left hand and started punching the deceased with his right hand many times in a forceful manner. According to PW6 (see p. 33 of the appeal record):

> Dia (referring to the appellant) pegang rambut dengan tangan kiri dan tumbuk dengan tangan kanan banyak kali. Dia (referring to the appellant) tumbuk dengan kuat.

[10] The appellant continued to punch the deceased despite PW6's urging him to stop. In the words of PW6 (see also p. 33 of the appeal record):

> Saya cuba suruh dia (referring to the appellant) berhenti. Dia (referring to the appellant) tak berhenti. Dia (referring to the appellant) terus menumbuk Zarina.

[11] According to PW6, the appellant had used a pillow found on the bed to cover the deceased's face before the deceased stopped crying. PW6 saw the deceased breathless and the deceased asked for water. PW6 gave the deceased some drinking water. The deceased then said that she wanted to sleep ("nak tidur"). Thereafter, the deceased fainted.

[12] According to PW6, even before that fateful day, he used to see the appellant hitting the deceased. PW6 was unsure how many times. PW6 also testified that the appellant would hit the deceased when the latter was crying. PW6 testified that he, PW5 and PW2 never assault or beat the deceased on the day of the incident.

[13] It was suggested to PW6 that the appellant hit the deceased without using force. To this suggestion PW6 disagreed.

[14] Both PW5 and PW6 confirmed that prior to 1 May 2001, the appellant would beat the deceased when the latter was crying.

[15] Brown anak Nangoi (PW8) was on duty at Drop Inn Lodge City Centre on the night of 1 May 2001. PW8 testified that as he was sitting at the guest waiting lounge, the appellant came and asked him to open the door of the hotel which was situated at the first floor of the building. He then saw the appellant going back to room 2028 and later came out holding the deceased in his arms. The deceased at that time was wearing her pyjamas. PW8 identified the deceased through photographs marked as exhs. P3A to P3D. According to PW8, the deceased was not crying at that particular moment.

[16] On arrival at Hospital Kuala Lumpur on 2 May 2001 at about 1.55am, Dr Nik Ahmad Shaifudin bin Nik Him (PW3) who was the medical officer on duty at the emergency department attended to the deceased. PW3 testified that the deceased was clinically dead at the time he received the deceased as she was not breathing, not showing any vital signs such as having blood

pressure and pulse. PW3 then applied respiratory treatment and gave the deceased oxygen and conducted cardio-pulmonary resuscitation (CPR) treatment. All these efforts failed to revive the deceased. Subsequently, the deceased was declared dead.

[17] On 2 May 2001 at about 1.55am, PW3 lodged a police report pertaining to the death of the deceased. That police report was marked as exh. (P7). This was what PW3 wrote in his police report:

> Seorang budak perempuan Melayu dibawa masuk ke Zon Merah oleh Aziz bin Mat Shah didapati pesakit tidak bernafas, kaku, sejuk, bola anak mata tidak reaktif. Rawatan pemulihan dilakukan selama 20 minit tetapi tidak respons.
>
> Didapati pesakit mengalami beberapa kecederaan fizikal, seperti:
>
> 1. Kesan lebam pada bahagian frontal.
> 2. Kecederaan terbakar pada peha kanan dua tempat, berukuran 1 x 1 cm masing-masing.
> 3. Kesan terbakar juga didapati pada lengan kiri.
> 4. Kesan lebam pada anterolateral hemithorax (dada) = 5 x 5cm.
> 5. Kesan lebam pada bahagian kanan bawah perut berukuran 5.5cm.
> 6. Kesan lebam dan bengkak pada telinga kiri = 3 x 3.
>
> Pronounced dead: 1.55 a.m. 2/5/2001
>
> Sebab kematian: Pending Post Mortem.
>
> Sekian.

[18] When questioned by PW3 who had caused the injuries and marks on the deceased, the appellant deliberately lied when he answered in this fashion, "Ada jumpa En. Aziz semasa pesakit dibawa? En. Aziz memberitahu pesakit telah dipukul dan saya bertanya siapa yang pukul. Dia mengatakan pesakit dipukul oleh bapa kandungnya. Saya bertanya adakah menggunakan senjata berbahaya? Ia mengatakan tidak. Ia tidak mengetahui menggunakan senjata, dan oleh bapa kandungnya dan bukan dia" (see p. 22 of the appeal record).

[19] Dr. Mohd Shah bin Mahmood (PW7), the forensic pathologist, performed the post-mortem on the deceased and he listed the cause of death as, "Kecederaan dalam abdomen akibat blunt trauma". PW7 testified that the deceased's liver was "torn 3 centimeters" and that injury by itself could cause death (see p. 41 of the appeal record). According to PW7 the injuries were caused approximately three to six hours before being brought to the hospital based on the fresh bleeding seen at the torn liver (see p. 42 of the appeal record). According to PW7, the injuries to the deceased's liver as reflected from the photographs marked as exhibits P3L, P3M, P3N and P3O were most probably caused by a heavy blow to the abdomen. PW7 agreed that a forceful blow using hand could have caused this kind of injury. The good doctor testified that, "Pukulan alat yang keras dan tumpul eg, tumbukan, tendangan atau alat yang keras dan tumpul seperti kayu" would come within the ambit of "pukulan kuat" (see p. 41 of the appeal record).

[20] PW7 prepared a post-mortem report marked as exh. "P8" and he listed the cause of death as alluded to earlier. In that post-mortem report, PW7 also listed the details of the other injuries found on the body of the deceased as follows:

1. Lima kesan lebam kecil di pipi kiri.
2. Lebam kecil di cuping telinga kiri.
3. Calar kecil di pipi kiri.
4. Calar kecil pada batang hidung.
5. Tiga lebam kecil di dahi.
6. Lebam kecil di bawah kelopak kedua belah mata.
7. Lebam kecil di pangkal leher.
8. Bintik-bintik lebam di dada.
9. Calar kecil di siku kiri.
10. Parut luka lama di pangkal peha kanan dan tangan kanan.
11. Lebam kecil di sebelah atas punggung kanan.

[21] Again, in that post-mortem report, PW7 arrived at the following conclusions:

> Saya telah dimaklumkan bahawa simati telah dibawa ke Jabatan Kecemasan HKL pada awal pagi 2 Mei 2001. Simati disahkan telah meninggal dunia semasa diperiksa di Jabatan Kecemasan.
>
> Bedahsiasat mendapati simati mengalami banyak kecederaan lebam di muka dan kulit kepala. Terdapat kesan pendarahan di bawah selaput otak dan juga perdarahan di dalam abdomen. Punca perdarahan dalam abdomen adalah akibat luka koyak pada bahagian hati dan kecederaan ini boleh menyebabkan kematian.
>
> Saya berpendapat bahawa luka koyak pada bahagian hati adalah akibat 'blunt-trauma' pada abdomen.

[22] The post-mortem report of PW7 revealed old and new injuries on the body of the deceased. Both PW5 and PW6 corroborated one another and they confirmed that the appellant had assaulted the deceased prior to 1 May 2001.

Prima Facie Case

[23] At the close of the prosecution's case, the learned judge of the High Court conducted a maximum evaluation of the evidence adduced by the prosecution, a requirement of this court as stipulated in the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA, and found that a *prima facie* case was established and directed the appellant to enter his defence.

[24] In *Balachandran v. PP* [2005] 1 CLJ 85, the Federal Court had occasion to set out the standard of proof on the prosecution at the close of the case for the prosecution. The late Augustine Paul JCA (later FCJ) who sat in the Federal Court aptly laid down the law in erudite terms (see pp. 99 to 101 of the report):

> Section 180(1) makes it clear that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case while s. 182A(1) enunciates that at the conclusion of the trial the court shall consider all the evidence adduced and decide whether the prosecution has proved its case beyond reasonable doubt. The standard of proof on the prosecution at the end of its case and at the end of the whole case has thus been statutorily spelt out in clear terms. The submission made must therefore be rationcinated against the background of the meaning of the phrase '*prima facie* case' in s. 180. Section 180(2) provides that the court shall record an order

of acquittal if a *prima facie* case has not been made out while s. 180(3) provides that if a *prima facie* case has been made out the accused shall be called upon to enter his defence. A *prima facie* case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal. The phrase '*prima facie* case' is defined in similar terms in Mozley and Whiteley's *Law Dictionary*, 11th edn as:

A litigating party is said to have a *prima facie* case when the evidence in his favour is sufficiently strong for his opponent to be called on to answer it. A *prima facie* case, then, is one which is established by sufficient evidence, and can be overthrown only by rebutting evidence adduced by the other side.

The result is that the force of the evidence adduced must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts exist or did happen. On the other hand if a *prima facie* case has not been made out it means that there is no material evidence which can be believed in the sense as described earlier. In order to make a finding either way the court must, at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established. As the trial is without a jury it is only with such a positive evaluation can the court make a determination for the purpose of s. 180(2) and (3). Of course in a jury trial where the evaluation is hypothetical the question to be asked would be whether on the evidence as it stands the accused could (and not must) lawfully be convicted. That is so because a determination on facts is a matter for ultimate decision by the jury at the end of the trial. Since the court, in ruling that a *prima facie* case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a *prima facie* case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no *prima facie* case.

As the accused can be convicted on the *prima facie* evidence it must have reached a standard which is capable of supporting a conviction beyond reasonable doubt. However it must be observed that it cannot, at that stage, be properly described as a case that has been

proved beyond reasonable doubt. Proof beyond reasonable doubt involves two aspects. While one is the legal burden on the prosecution to prove its case beyond reasonable doubt the other is the evidential burden on the accused to raise a reasonable doubt. Both these burdens can only be fully discharged at the end of the whole case when the defence has closed its case. Therefore a case can be said to have been proved beyond reasonable doubt only at the conclusion of the trial upon a consideration of all the evidence adduced as provided by s. 182A(1) of the Criminal Procedure Code. That would normally be the position where the accused has given evidence. However, where the accused remains silent there will be no necessity to re-evaluate the evidence in order to determine whether there is a reasonable doubt in the absence of any further evidence for such a consideration. The *prima facie* evidence which was capable of supporting a conviction beyond reasonable doubt will constitute proof beyond reasonable doubt.

The Case For The Defence

[25] The appellant gave his evidence on oath. The appellant did not deny that he had hit the deceased with his hand. According to the appellant what he did was to stop the deceased from crying and not to kill her. The incriminating cautioned statement (exh. D11) of the appellant showed that he intended to inflict those blows on the deceased.

[26] The appellant conceded that the deceased had died and that her death was caused by the blows which he inflicted on the deceased. Nevertheless, the appellant had different perceptions as to the degree and nature of the blows which he inflicted on the deceased. Under cross-examination, the appellant said that he knew that every part of the human body is vital. He agreed that the physical strength of a child of about three years of age is different from a young male adult of 22 years of age. The appellant conceded, under cross-examination, that no matter how angry an adult may get at a child, the most that he can do is to cane the child. The appellant admitted, under cross-examination, that it is cruel to punch a child of about three years of age on the chest.

Burden At The End Of The Defence Case

[27] At the end of the case for the defence, the learned judge of the High Court found that the prosecution had established its case beyond reasonable doubt and held that the appellant was guilty under s. 300(c) of the Penal Code and accordingly convicted the appellant and sentenced him to death under s. 302 of the Penal Code.

The Appeal

[28] Two observations must be made here. Firstly, is the prosecution bound by what was stated in the opening address as seen at pp. 4 to 8 of the appeal record? Secondly, the power of this court to review or re-evaluate all the available evidence adduced by the prosecution.

[29] Taking the first observation, the prosecution relied on limb (b) to s. 300 of the Penal Code in its opening address whereas the learned judge of the High Court relied on limb (c) to s. 300 of the Penal Code in convicting the appellant. The late Augustine Paul FCJ writing a separate judgment for the Federal Court in the case of *PP v. Sa'ari Jusoh* [2007] 2 CLJ 197, at p. 222 aptly said after reviewing some authorities that:

> It follows that a verdict can be founded on a basis not indicated by the prosecution in its opening address. But it must be done in such a way so as not to place the accused at a tactical disadvantage with resultant unfairness to him. This conclusion is consistent with s. 422 of the Criminal Procedure Code ... .

[30] Murray J, writing for the Court of Criminal Appeal in the case of *The People (Director of Public Prosecutions) v. C* [2001] 3 IR 345, aptly said:

> The trial judge also observed 'I am not aware of any case which does not change from the opening speech of counsel as it proceeds through evidence to a greater or lesser degree.' It is in the very nature of the trial process where evidence is presented and tested, that new facts or elements may emerge as the trial proceeds. As the learned trial judge indicated the mere fact that a conflict of evidence has emerged which was not reflected in the opening of the case by the prosecution is not a basis for directing a verdict of not guilty. If something emerges during a trial which goes to the very root of the prosecution case rendering it tenuous or dangerous upon which to convict then such an issue, having been addressed on its own merits, would be a ground for such a direction to a jury. The mere fact that the prosecution, in opening the case, did not anticipate a particular conflict of evidence is not such a ground. No basis has been established upon which the trial judge should have directed the jury to acquit and this ground of appeal must be refused.

[31] It is our judgment that the learned High Court judge is certainly entitled to rely on limb (c) to s. 300 of the Penal Code in convicting the appellant because that limb was suitable to be invoked based on the evidence adduced before her.

[32] In regard to the second observation, the case of *Tan Boon Teck v. PP* [1949] 1 LNS 89 HC is authority for the proposition that an appeal is merely a continuation of the trial and throws open all the evidence to be reviewed or to be re-evaluated by the appellate court in order to determine whether or not the various findings made by the trial court are correct.

[33] The late Sharma J, in *Mohamed Mokhtar v. PP* [1971] 1 LNS 84, aptly said:

> When the appellate court is convinced, as I am in this case, that the conviction of the appellant was good and there is nothing to cast any shadow of doubt in the finding of guilt arrived at by the learned magistrate or the president, the court itself can deal with the matter as fully and as effectively even though the grounds of decision as appearing in the appeal record are found lacking in specific findings and the reasons for those findings.

[34] Zulkifli Ahmad Makinudin FCJ in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800, writing for the Federal Court had this to say at pp. 818 to 819 of the report:

> As regards the first main ground of appeal raised by the appellant, I am of the view that the Court of Appeal has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial Court are correct. (See *Mohamed Mokhtar v. PP* [1972] 1 MLJ 122). In the present case even though the Court of Appeal took the view that the High Court judgment was of no assistance, it nevertheless had considered and subjected all the evidence adduced by the prosecution to a critical re-examination. The Court of Appeal had given sound reasons as to why the evidence was admitted and how it had implicated the appellant. There was no miscarriage of justice against the appellant as the Court of Appeal's decision was based on evidence adduced from the witnesses called by the prosecution as appearing in the appeal records. I am therefore of the view that the Court of Appeal did not err on this issue.

[35] It is settled law that an error by a trial judge in his or her handling of the facts is a good ground for quashing the conviction (*Chow Kok Keong v. PP* [1998] 2 CLJ 469 FC; and *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705, FC). And if that happens, it warrants appellate interference. And that would be the outcome of

reviewing or re-evaluating the available evidence, if the need arises. Our main concern is that the conviction is safe (*Mohammad Hussain s/o Alimuddin and others v. Emperor* AIR (32) 1945 Nagpur 116; and *Zahari Yeop Basri & Anor v. PP* [1977] 1 LNS 162 HC).

[36] Now to the heart of the matter. Section 300 of the Penal Code states as follows:

> 300. Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
>
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
>
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

[37] The essential ingredients to prove the offence of murder are:

(a) that the deceased is dead;

(b) that death was caused by the act of the accused (here appellant); and

(c) that the act of the accused (here appellant) was done with the intention as enumerated in s. 300 of the Penal Code.

[38] In regard to the first ingredient, the identity of the deceased was proven by PW2 and Embon bt. Mat Ali (PW4). PW4 was the grandmother of the deceased. PW7 also testified as to the death of the deceased and listed the cause of death in the post-mortem report. PW7 also testified that a forceful blow using hand could have caused the injury to the deceased's abdomen.

[39] In regard to the second ingredient - who had caused the death of the deceased, we have the evidence of the two brothers (PW5) and (PW6). Both corroborated one another and both

witnessed the assaults against the deceased by the appellant repeatedly. Their evidence was in harmony with the testimony of PW7. The appellant himself admitted, in his defence, assaulting the deceased. There was concession on the part of the appellant when he admitted that the death of the deceased was caused by him. However, we noted that according to the appellant he had no intention to kill the deceased but rather to stop the deceased from crying. We also noted that the appellant said that he had no knowledge that his acts could have resulted in the death of the deceased.

[40] In regard to the third ingredient concerning the third limb to s. 300 of the Penal Code, we categorically say that the learned High Court judge was correct in her assessment of the available evidence to invoke the third limb - that would be limb (c), to s. 300 of the Penal Code. Towards this end, it is germane to refer to the case of *Virsa Singh v. State of Punjab* AIR 1958 SC 465 where V Bose J, enumerated the ingredients to be proved under the third limb to s. 300 of the Indian Penal Code which is in *pari materia* with our third limb to s. 300 of the Penal Code. There, at p. 467, his Lordship had this to say:

> To put it shortly, the prosecution must prove the following facts before it can bring a case under s. 300 'thirdly'.
>
> First, it must establish, quite objectively, that a bodily injury is present.
>
> Secondly, the nature of the injury must be proved. These are purely objective investigations.
>
> Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.
>
> Once these three elements are proved to be present, the enquiry proceeds further and,
>
> Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender.
>
> Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s. 300 'thirdly'. It does not matter that there was

> no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional.

[41] The enquiry to determine intention to inflict the injury on the deceased is based on commonsense. It is unnecessary to ask the question whether the appellant here intended to injure the deceased's liver. The relevant enquiry would be whether there was an intention on the part of the appellant to strike at the vital spot with sufficient force to cause the kind of injury sustained by the deceased. According to the appellant, PW5 commented that the appellant beat the deceased like as though the appellant was beating the appellant's friend. The appellant was shocked on hearing PW5's comment and it dawned on the appellant that he never assaulted the deceased like what he had done on that fateful day.

[42] The right enquiry to determine the appellant's intention of inflicting those blows on the deceased can be distilled from the judgment of V Bose J, in *Virsa Singh v. State of Punjab (supra)* at p. 467, and there his Lordship succinctly laid down the law:

> In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted. It is, of course, not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or the kidneys or the heart. Otherwise, a man who has no knowledge of anatomy could never be convicted, for if he does not know that there is a heart or a kidney or bowels, he cannot be said to have intended to injure them. Of course, that is not the kind of enquiry. It is broad-based and simple and based on commonsense: the kind of enquiry that 'twelve good men and true' could readily appreciate and understand.

[43] The facts in *Virsa Singh v. State of Punjab (supra)* may be stated as follows. The victim was injured by a spear thrust by the accused and died 21 hours later from peritonitis caused by the wound. The defence counsel argued that the prosecution had to prove that the intention in the first clause of s. 300(c) of the Indian Penal Code must also relate to the second clause and that "the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." It was argued that the prosecution had to establish that the accused intended to cause the injury and knew that the injury was sufficient in the ordinary course of nature to cause death.

[44] The *Virsa Singh* test emphasises an objective approach to the second clause of s. 300(c) of the Indian Penal Code. Thus, once the intention to inflict the bodily injury is established, the offender's mental state falls out of the equation.

[45] Now, in asking the question of whether the accused intended to inflict the injury actually found to be present, V Bose J, said that the enquiry must proceed along "broad lines." And the issues to be considered would be "whether there was an intention to strike at a vital or dangerous spot" and "whether with sufficient force to cause the kind of injury found to have been inflicted." But his Lordship said that "it is not necessary to enquire into every last detail as, for instance, whether the prisoner intended to have the bowels fall out, or whether he intended to penetrate the liver or kidneys or the heart." Otherwise, according to his Lordship, someone with no knowledge of anatomy could never be convicted. So the enquiry, according to his Lordship, is therefore "broad-based and simple and based on commonsense."

[46] The next case to refer to would be the case of *PP v. Visuvanathan* [1977] 1 LNS 103 HC, a decision of the Singapore High Court with two judges presiding. The accused in that case stabbed the victim in the chest with a knife. The prosecution relied on s. 300(c) of the Singapore Penal Code and the accused argued that the accused must know that the bodily injury is sufficient in the ordinary course of nature to cause death. The Singapore High Court rejected this argument and held that once the intention to cause the kind of injury found to be inflicted is proved, the only relevant question to ask is whether, "as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to

cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict." At p. 161, the Singapore High Court sets out the following test:

> In our judgment for the application of clause (c) of section 300 of the Penal Code, all the prosecution must prove is:
>
> (1) that the accused did an act which caused the death of the deceased;
>
> (2) that the said act was done with the intention of causing bodily injury;
>
> (3) that the injury caused:
>
> (a) was intended and was not accidental or otherwise unintentional; and
>
> (b) was sufficient in the ordinary course of nature to cause death.
>
> There is no other requirement.

[47] It must be stated that this test was re-affirmed by the Singapore Court of Appeal in *Tan Cheow Bock v. Public Prosecutor* [1991] 1 LNS 37.

[48] It is our judgment that even if the appellant here intended to inflict only a relatively minor injury, and if the injury that he in fact inflicted pursuant to that intention was an injury sufficient in the ordinary course of nature to cause death, the provisions of the third limb to s. 300 of the Penal Code would be attracted. We must emphasise, to borrow the words of V Bose J, in *Virsa Singh v. State of Punjab (supra)*, that "no one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder."

[49] Further support for the correct interpretation of the third limb to s. 300 of the Penal Code can be found in the case of *Rajwant Singh, Kalarimadathil Unni v. State of Kerala* AIR 1966 SC 1874. There Hidayatullah J, writing for the court had this to say at p. 1878:

> The third clause discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient

A to cause death in the ordinary way of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not. As was laid down in *Virsa Singh v. State of Punjab*, 1958 SCR 1495: (AIR 1958 SC 465) for the application of this clause it must be
B first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the
C offender the offence of murder is established.

Applying these tests to the acts of the appellants we have to see first what bodily injury has been established. The bodily injury consisted of tying up the hands and feet of the victim, closing the mouth with adhesive plaster and plugging the nostrils with cotton soaked in
D chloroform. All these acts were deliberate acts which had been preplanned and they, therefore, satisfy the subjective test involved in the clause. The next question is whether these acts considered objectively were sufficient in the ordinary course of nature to cause death. In our judgment they were. The victim could only possibly
E breathe through the nostrils but they were also closed with cotton wool and in addition an asphyxiating agent was infused in the cotton. All in all it would have been a miracle if the victim had escaped. Death of the victim took place as a direct result of the acts of his assailants.

F **[50]** Again, in *Anda and others v. The State of Rajasthan* AIR 1966 SC 148, Hidayatullah J, writing for the court expressed the same sentiments as seen at p. 151 of the report:

The third clause views the matter from a general stand point. It
G speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and the causing of such injury is intended the offence is murder.
H Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature. If the intended injury cannot be said to be sufficient in the ordinary course
I of nature to cause death, that is to say, the probability of death is not so high, the offence does not fall within murder but within culpable homicide not amounting to murder or something less. The illustration appended to the clause thirdly reads:

(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death.

The sufficiency of an intentional injury to cause death in the ordinary way of nature is the gist of the clause irrespective of an intention to cause death. Here again, the exceptions may bring down the offence to culpable homicide not amounting to murder.

[51] Continuing at pp. 152 to 153 of *Anda and Others v. The State of Rajasthan (supra)*, Hidayatullah J, said:

Next one must look for the requisite ingredient that the injuries which were intended to be caused were sufficient to cause death in the ordinary course of nature. Next we must see if the accused possessed the knowledge that the injuries they were intending to cause were sufficient in the ordinary course of nature to cause death. When these circumstances are found and death is, in fact, caused by injuries which are intended to be caused and which are sufficient in the ordinary course of nature to cause death the resulting offence of each participant is murder.

In this case the accused beat Bherun inside a house after dragging him there. The number of injuries shows, that all took part. His arms and legs were smashed and many bruises and lacerated wounds were caused on his person. The injuries intended to be caused were sufficient in the ordinary course of nature to cause death. The assault was thus murderous and it must have been apparent to all the assailants that the injuries they were inflicting in furtherance of the common intention of all were sufficient in the ordinary course of nature to cause death. In these circumstances it cannot be said that the offence was not murder but only culpable homicide not amounting to murder.

[52] Ratanlal & Dhirajlal's *Law of Crimes*, 24th edn, vol. two, Bharat Law House, New Delhi 1998, at pp. 1285 to 1287 are useful to refer. There the learned authors wrote:

This clause (referring to limb (c) of section 300 of the Indian Penal Code) states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this clause and clause (2) of section 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of murder; if there was probability in a less

degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction should be of culpable homicide not amounting to murder (*Po Sin* [1909] 5 LBR 80; 10 Cri LJ 359; *Apalu* [1932] 1 Ran 285; *Daljit Singh* AIR 1937 Nag 274; (1938) 39 Cri LJ 92 (Nag); Behari AIR 1953 All 203; 1953 Cri LJ 565 (All)). It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability of death is very great, the requirements of this clause are satisfied, and the fact that a particular individual may be the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution has survived an injury which would prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient 'in the ordinary course of nature' to cause death (*Singaram Padayachi* AIR 1944 Mad 223; [1944] 45 Cri LJ 729 (Mad)). If a person knowingly causes injuries which are more likely to cause death than not in the ordinary way, his offence falls under either the second or third clause (*Arjan Singh* [1942] 23 Lah 145; *Onkar* [1972] 4 SCC 783; 1972 Cri LJ 1059 (SC); *State v. Jagir Singh Baljit Singh* 1973 Cri LJ 1589 (SC); *Mohinder Singh* [1975] Cri LJ 1320 (SC); AIR 1975 SC 1506; 1975 SCC (Cri) 211; *Sornavelayutham Pillai* [1977] Cri LJ 421 (SC); *State v. Ramji Das* AIR 1977 SC 1085; 1977 Cri LJ 705 (SC); *Veluswamy* [1983] Cri LJ 1087 (SC); *Ferzand Ali* [1985] Cri LJ 1248 (All); *Dalip Singh* [1985] SCC (Cri) 486; AIR 1986 SC 316; *Surinder Kumar* AIR [1987] SC 692; 1987 Cri LJ 537 (SC); *Juthel* [1995] Cri LJ 2909 (SC)). Where a common intention of two or more persons to kill the deceased was established, the question as to who gave the fatal blow would become wholly irrelevant and once the medical evidence showed that the injuries caused by one or the other accused were sufficient in the ordinary course of nature to cause death, that would bring the case of the accused within the purview of section 302/34 (*State v. Kalu Shivram Jagtap* [1980] Cri LJ 570 (SC); *Vishnu Daga Pagar* [1997] Cri LJ 2430 (Bom)).

When there are several injuries, and even if none of the injuries is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they may be sufficient in the ordinary course of nature to cause death, the offence will be murder and not culpable homicide not amounting to murder (*Thakur Das* [1967] Cri LJ 1455 (All); AIR 1967 All 495; *State v. Tej Ram* 1981 SCC (Cri) 257). In the case of some classes of injuries, it is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life. But, in the case of wounds with blunt instruments, the intention is not so clear.

The effect of a severe blow upon one man will be very different from what it will be upon another, and it does not follow when the victim dies, that it was intended to inflict such injury as is sufficient to cause death. A Judge must always find whether the bodily injury inflicted was that which was intended by the accused (*Muvvalla Kondaiya* [1882] 1 Weir 300). The nature of the offence does not depend merely on the location of the injury caused by the accused. The intention of the person causing the injury must be gathered from a careful examination of all the facts and circumstances of each given case. Where the appellant had intended to cause injury to fatal parts of the deceased and had administered a stab wound on the back side of the chest of the deceased and when the deceased's brother tried to intervene, the appellant inflicted two stab wounds on him also in the same manner, which, however, did not prove fatal, the conviction of the appellant under sections 302 and 307 were maintained (*Jaspal Singh* AIR [1986] SC 683; 1986 SCC (Cri) 119; 1986 Cri LJ 488 (SC)).

The emphasis in this clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder (*Mariadasan* AIR [1980] SC 573; 1980 Cri LJ 412 (SC); 1980 SCC (Cri) 523; *Morcha* AIR [1979] SC 80; 1978 Cri LJ 1710 (SC); 1979 SCC (Cri) 241; *State v. Pashupati Singh* [1973] Cri LJ 1832 (SC); *Arumuga Nadar* AIR [1976[SC 2588; 1977 SCC (Cri) 124; 1976 Cri LJ 1998 (SC); *Vishnu Daga Pagar* [1997[Cri LJ 2430 (Bom)). Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant (*Anda* AIR [1966] SC 148; 1966 Cri LJ 171 (SC)). In some cases the sufficiency of injury to cause death in the ordinary course of nature must be proved and cannot be inferred from the fact that death has in fact taken place. In such a case it may not be open to argue backwards from the death to the blow, to hold that the sufficiency is established because death did result. As death can take place from other causes the sufficiency is required to be proved by other and separate evidence. There are, however, cases and cases where the victim is helpless or rendered helpless and offender does some act which leads to death in the ordinary course and death takes place from the act of the offender and nothing else, it is hardly necessary to prove more than the acts themselves and the causal connection between the acts and the end results (*Rajwant Singh* AIR 1966 SC 1874; 1966 Cri LJ 1509 (SC)). In cases of death caused by reckless violence the nature of the weapon used is a test for

A deciding whether the crime falls under section 299 or this clause (Hashim (1913) 7 SLR 29; (1913) 14 Cri LJ 459; *Saidino* (1915) 9 SLR 99; (1915) 16 Cri LJ 710). The nature of the material object used and the force used are useful guides in arriving at a decision as to whether the intention and knowledge required by this B section can be attributed to the accused (*Venkata Nari* (1937) Mad 684; *Currala Chinna Pitchai Vadu* [1938] MWN 871; (1938) 30 Cri LJ 979 (Mad)).

[53] The sum total of it all would be this. In proving an offence under limb (c) of s. 300 of the Penal Code, the crucial questions C to ask would be whether there is an intention to cause injury and whether that injury is sufficient in the ordinary course of nature to cause death. It must be recalled that both PW5 and PW6 testified that the appellant had inflicted bodily injuries on the deceased. The forceful blows on the deceased's abdomen contributed to the cause D of death of the deceased. The cautioned statement of the appellant in exh. D11 lends credence to the prosecution's case in that it showed that the appellant intended to inflict those blows on the deceased. PW7 testified that the injuries sustained were sufficient in the ordinary course of nature to cause death. The finding of facts E by the learned High Court judge cannot be reversed. In our judgment, the appeal centred for the most part on factual issues. We declined to interfere. In the absence of palpable or overriding error which affected the learned High Court judge's assessment of the facts, we would uphold her findings (*Lee Ah Seng & Anor v. PP* F [2007] 5 CLJ 1 FC; *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197 FC, and *Bear Island Foundation et al. v. Attorney-General for Ontario; Attorney-General of Canada et al., Interveners* 83 DLR (4th) 381).

[54] We noted that the learned High Court judge took into G account and considered all the evidence adduced in support of the defence. It is trite law that the court must consider carefully whether the defence advanced by the appellant is capable of raising a reasonable doubt in the prosecution's case. We too have embarked on such a process by considering the defence story. We are aware H of the advice of Mohamed Azmi SCJ in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311. This was what his Lordship said:

We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution's case as against the falsity of I the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] MLJ 263 go one step

> further before convicting the accused by giving due consideration as to why the defence story, though could not be believed, did not raise a reasonable doubt in the prosecution case. Thus, even though a judge does not accept or believe the accused's explanation, the accused must not be convicted until the court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt in the prosecution case.

[55] It is salutary to recall to mind the rule of law that says that the failure to consider a possible legal defence is a miscarriage of justice (*Ong Ah Too v. Regina* [1955] 1 LNS 80 HC). In the face of the overwhelming evidence, the learned counsel for the appellant urged us to consider amending the offence from s. 300 of the Penal Code to s. 304 of the Penal Code. We declined to interfere with the decision of the learned judge of the High Court.

[56] At the close of the defence case, the burden on the appellant would be to cast a reasonable doubt in the prosecution case. In *Mohamad Radhi Yaakob v. PP (supra)*, Mohamed Azmi SCJ laid down the following principles of law:

> It is a well-established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case.

[57] Continuing on the same page, his Lordship said:

> If defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[58] Any reasonable tribunal hearing this appeal would conclude that it was the appellant who was responsible for the death of the deceased. We dismissed the appellant's appeal. The conviction and sentence are hereby affirmed.